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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1957

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF AGRICULTURE

ROBERT L. FARRINGTON,
General Counsel,
NEIL BROOKS,
Assistant General Counsel,
DONALD A. CAMPBELL,
Attorney,
U. S. Department of Agriculture, Washington, D. C.

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We shall not attempt, in this reply brief, to repeat or restate the arguments already set forth in our main brief. A few paragraphs will suffice to focus the issues and to mark out some of the irrelevant and erroneous arguments in the respondent's brief.

THE REGULATIONS ISSUED BY THE STOCKYARD OWNER ARE NOT, AS A MATTER OF LAW, VIOLATIVE OF THE REQUIREMENTS IN THE PACKERS AND STOCKYARDS ACT

A. THE RESPONDENT CONTENDS, IN ITS BRIEF, THAT A STOCKYARD OWNER AND, ALSO, THE RESPONDENT, AS A MARKET AGENCY, ARE PUBLIC UTILITIES, BUT IF SO THE REGULATIONS ARE NOT, AS A MATTER OF LAW, INVALID

The Denver Union Stock Yard Company is characterized by the respondent, in its brief, p. 1, as "a public

utility," and emphasis is given to the characterization by repeating it throughout the argument in the respondent's brief.[1] It is also made plain in the respondent's brief, p. 20, that the respondent, as a market agency at the Denver stockyard, is a public utility "no less than the stockyard."[2] Although the respondent unqualifiedly asserts, in its brief, p. 24, that "[b]eing a public utility, Denver Union Stockyard Company must furnish services to respondent and other market agencies and dealers," nonetheless the respondent nowhere demonstrates, in its brief, (1) that the regulations which are challenged in this case are to be tested, as a matter of law, by whether

[1] It was said in *Stafford* v. *Wallace*, 258 U. S. 495, 516, that the Packers and Stockyards Act "treats the various stockyards of the country as great national public utilities to promote the flow of commerce * * *." The Act does not, however, "require that a stockyard establish any need for its existence in the way of obtaining a license or a certificate of public convenience and necessity. Posting of the stockyard [by the Secretary] makes it and the transactions at the stockyard * * * subject to the supervision and control of the Secretary but confers no franchise or charter upon the stockyard company. Fundamentally Title III [of the Act] superimposes the [A]ct's supervision and control upon an industry which has its own rules and regulations such as those of the stockyard company and, at terminal stockyards, those of the Livestock Exchange consisting of the market agencies at the stockyard * * *." Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 165–166.

[2] A market agency, i. e., a person who engages in the business of buying or selling livestock, on a commission basis, at a posted stockyard or otherwise furnishing stockyard services, must register with the Secretary of Agriculture. 7 U. S. C. 1952 ed. § 203. One of the evils to be prevented by the Packers and Stockyards Act is collusion between market agencies and packers and dealers. *Stafford* v. *Wallace*, 258 U. S. 495, 515.

the Denver stockyard and, also, the respondent, as a market agency at the Denver stockyard, are public utilities, and, if so, (2) that the regulations are violative of the duty of a public utility, i. e., the stockyard owner, to furnish services to another concern, i. e., the respondent, which is also a public utility.

The respondent also fails—in asserting that the Denver stockyard is a public utility and that the respondent, as a market agency, is a public utility also—to recognize that public utilities at common law were not under an absolute or unconditional duty to furnish services, and "[i]t was even doubted whether they were bound to make the same charge to all persons for the same service." *Interstate Com. Comm.* v. *Baltimore & O. Railroad,* 145 U. S. 263, 275. The duty of a public utility to render services is merely a duty to render services which, in the circumstances, are reasonable. *Interstate Com. Comm.* v. *Baltimore & O. Railroad, supra,* 145 U. S. at 283–284; *Birmingham* v. *Rice Bros.,* 238 Iowa 410, 26 N. W. 2d 39, 42–43, certiorari denied, 338 U. S. 768; *Elk Hotel Co.* v. *United Fuel Gas Co.,* 75 W. Va. 200, 83 S. E. 922, 923–925; *People ex rel. New York Edison Co.* v. *Public Service Com.,* 191 App. Div. 237, 181 N. Y. Supp. 259. See, also, *Express Cases,* 117 U. S. 1, 24–29. For example, "[d]iscrimination as to service and rates may be based upon a reasonable classification." *Bilton Machine Tool Co.* v. *United Illuminating Co.,* 110 Conn. 417, 148 A. 337, 340. See also, *Cincinnati, N. O. & Tex. Pac. Railway* v. *Interstate Com. Comm.,* 162 U. S. 184, 193–194; *Interstate Com.*

Comm. v. *Baltimore & O. Railroad, supra,* 145 U. S. at 283–284.

"Only unreasonable and unjust discriminations [by a public utility] are unlawful," and "[n]o invariable rule or exact standard for determining what transactions are unlawful because discriminatory or preferential has been, and from the very nature of the case can be, definitely prescribed" because whether the services are reasonable is a question of fact "to be resolved upon a consideration of the proofs in each case; the burden always being on the complaining party." *Elk Hotel Co.* v. *United Fuel Gas Co.,* 75 W. Va. 200, 83 S. E. 922, 924. It is a "question of fact whether, upon the differences thus shown [in the testimony], there was an unjust discrimination." *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U. S. 92, 103.

No evidence was received, however, in the administrative proceeding in the case at bar, inasmuch as the respondent—i. e., the complainant in the administrative proceeding—elected to stake the case on the proposition that the regulations in this proceeding under the Packers and Stockyards Act are, on their face, invalid as a matter of law (R. 72, 74–75). There can be no doubt that a public utility, so long as it furnishes reasonable service to its patrons, is not, as a matter of law, precluded from establishing "such reasonable rules, in respect to the use of its property, as the public convenience and its interests may suggest * * *." *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, 293. As was said by the Court of Appeals in the case at bar, a public utility "may prescribe rules

for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory regulations to that end" (R. 80).

The regulations in this case apply to the respondent in its capacity as a market agency—i. e., a business concern which describes itself as a public utility, and which is registered with the Secretary to buy and sell livestock at the Denver stockyard on a commission basis—and the regulations, by their terms, are designed to prevent a market agency, while transacting business at the stockyard, from engaging in the practice of interfering with the normal flow of livestock to the Denver market or diverting livestock out of the normal flow to the Denver market (R. 12–13, 39). Even if the stockyard owner and, also, the respondent, as a market agency, are public utilities, nonetheless the regulations are not invalid unless on the record of the evidence, in a rogatory proceeding, it is concluded that the regulations are unreasonable. In addition, as shown in the following section of our brief, there is no reference to public utilities as such in the Packers and Stockyards Act.

B. THE DUTIES OF A STOCKYARD OWNER ARE SET FORTH IN THE PACKERS AND STOCKYARDS ACT, AND THE REGULATIONS IN THIS CASE ARE NOT, AS A MATTER OF LAW, VIOLATIVE OF THOSE STATUTORY PROVISIONS

The respondent refers, in its brief, to the Packers and Stockyards Act, but fails to take into account that the issues in this proceeding are within the compass of the Packers and Stockyards Act. This pro-

ceeding was instituted by the respondent under the Packers and Stockyards Act (R. 39–42), and the centric issue is whether the regulations issued by the stockyard owner are, as a matter of law, illegal under the Packers and Stockyards Act (R. 72, 74–75), which provides, *inter alia,* that it is "the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services" at a stockyard, which is posted for regulation under the Act, and to establish, observe, and enforce "just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services" (7 U. S. C. 1952 ed. §§ 205 and 208).

The applicancy of the Act is not dependent on whether a stockyard, such as the one which is owned and operated by the Denver Union Stock Yard Company, and a market agency, such as the respondent, are public utilities. The statute is based on the commerce clause in the Constitution and contains no reference to public utilities as such. The prime issue in the case is for resolution under the provisions of the Packers and Stockyards Act with respect to the duty of a stockyard owner to issue, observe, and enforce just, reasonable, and nondiscriminatory regulations relative to the furnishing of reasonable stockyard services.

The Court of Appeals decided the case on the basis of an imaginary or hypothetical situation in the market, with respect to the application of the regulations, and concluded that the regulations would be illegal in the imaginary or hypothetical situation

(R. 82). Accordingly the Court of Appeals concluded that the regulations are illegal on their face under the terms of the Packers and Stockyards Act (R. 83–84). It is significant that the respondent fails to undertake, in its brief, to discuss or try to distinguish the decisions of this Court which we cited in our main brief, pp. 54–58, for the principle that courts in passing on the validity of regulations, under an Act of Congress, are to dispose of the case on the basis of the facts disclosed, never on the basis of assumed or imaginary facts. The respondent avoids, in its brief, a discussion of the prior holdings by this Court by avoiding any mention of those cases.

In view of the respondent's assertions, in its brief, p. 53, that it would be a "waste of time" to develop the evidence with respect to the applicability and impact of the regulations, i. e., as to whether the regulations are reasonable in view of the wide-ranging conditions in the market, it is significant that the respondent fails, in its brief, to undertake to discuss or even to try to distinguish the catalog of circumstances in the livestock industry which we referred to in our main brief, pp. 66–73, and which may be relevant in resolving a factual issue as to the reasonableness of the contested regulations.

The respondent makes it plain in its brief, pp. 20–21, that it is a public utility—in its capacity as a market agency for the buying and selling of livestock, on a commission basis, at the Denver market—and that the Stock Yard Company is also a public utility, but significantly there is nothing in the respondent's

brief—and, of course, nothing in the record—to show that the regulations as applied to the respondent, in its capacity as a market agency, will result in a denial of reasonable stockyard services at the Denver market. It is in its capacity as a market agency that the respondent is a litigant in this case.

In the many auction stockyards, regulated under the Packers and Stockyards Act, the stockyard services of selling livestock are performed insofar as a market agency is concerned by the stockyard owner, and no one else.[9] It cannot be doubted that, as was said in *Express Cases*, 117 U. S. 1, 24, with respect

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[9] The Judicial Officer said, in this case, that the relationship between a stockyard owner and a market agency is "within the jurisdiction of the Secretary under the [A]ct as a matter in respect to the furnishing of stockyard services at a stockyard" (R. 19). See also, *Sioux City Stockyards Co. v. United States*, 49 F. Supp. 801, 802–804 (3-Judge Court, N. D. Iowa); Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 171–172. It is the duty of a stockyard owner and a market agency to issue just, reasonable, and nondiscriminatory regulations with respect to the furnishing of stockyard services (7 U. S. C. 1952 ed. § 208), and the issuance of any such regulation is subject to administrative supervision under the Packers and Stockyards Act (7 U. S. C. 1952 ed. §§ 210–213, 228).

[10] "Posted stockyards may be either markets for which the stockyard company furnishes the plant and facilities for the sale of livestock by market agencies such as is the case at the terminal stockyards * * * or auction stockyards at which the stockyard operator sells the livestock at auction. In the terminal stockyards the livestock is generally sold for the consignor by commission merchants, that is, market agencies which sell the livestock on a commission basis. The usual method of sale here is by private treaty rather than by auction because the market agency negotiates with one prospective purchaser at a time. The stockyard company's charges for yardage and feed and the selling agency's commission are deducted from

to the alleged right of an express company to the use of railroad property, "[s]o long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them." It was held in the *Express Cases, supra*, 117 U. S. at 24, that the "railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

There is nothing to show, in the record in this case, that the farmer-patrons of the Denver market will be denied reasonable stockyard services. The only complaint is by the respondent, a market agency, which is registered to "buy and sell livestock on a commission basis at the Denver Union Stockyard * * *" (R. 11). It is alleged by the respondent, in its complaint in the administrative proceeding, that in view of the respondent's business operations the regulations will result in the denial to "growers in the proscribed area [of] the service and advice they are justly entitled to" (R. 41–42). But the averments

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the proceeds of the sale and the balance remitted to the shipper. The shippers consign their livestock to a specific commission firm for sale or in many cases the shipper may leave to the trucker of his livestock the selection of a market agency. The buyers at the stockyard are market agencies who buy for their principals upon a commission basis, dealers who buy for their own account and for resale, packer-buyers who purchase slaughter livestock for their employers, or farmers who buy livestock for feeding or other purposes." Flavin, *The Packers and Stockyards Act, 1921*, 26 George Washington Law Review 161, 166–167.

by the respondent were denied in the answer filed by the Denver Union Stock Yard Company (R. 45–46), and by way of reconvention the cross demand was made that "strict proof thereof" be made as to the factual allegations and conclusions in the complaint in the administrative proceeding (R. 45). The respondent, as the complainant in the administrative proceeding, abandoned its factual allegations, and stated that it "will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law" (R. 72). Hence the record contains no evidence. Although we do not know what evidence would have been adduced, if a full hearing had been held, it must be recognized that, indeed, the evidence might have justified the conclusion that the regulations are within the zone of reasonableness.

The respondent's reliance, in its brief, pp. 21–36, on cases involving the duty of a public utility to its patrons, is misplaced. The case at bar involves, according to the respondent's firm position (brief, pp. 20–21), a controversy between two public utilities, *scil.*, the respondent, a market agency, and the Stock Yard Company, a stockyard owner. However, any farmer-patron of the Denver market is free to market his livestock at the Denver market. Not only are there numerous dealers and market agencies at the market, but in addition it is provided in the regulations of the Denver Union Stock Yard Company that "[a]ny owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without dis-

crimination reasonable facilities and services."[5] The complaint, in this case, is by a market agency which is engaged in the business of buying and selling livestock, on a commission basis, at the Denver market. The record fails to show any impairment of the stockyard services to farmer-patrons of the market, and the cases relied on by the respondent are not, in these circumstances, in point.

The uniform treatment of nonuniform conditions is not made mandatory by the statutory provision that a stockyard owner or market agency shall "furnish upon reasonable request, without discrimination, reasonable stockyard services" (7 U. S. C. 1952 ed. § 205). The variant and divergent circumstances incident to the feeding, holding, and marketing of hogs, cattle, sheep, and other livestock, at a posted stockyard, make it obvious that in furnishing facilities or other services a stockyard owner or a market agency may reasonably differentiate between situations and may, when reasonable, refuse to furnish certain facilities or other services and may, when reasonable, refuse to furnish any facilities or services. If a stockyard owner or market agency could not reasonably differentiate between different conditions the resulting system of rigid uniformity would manifestly be destructive of the principle of "reasonable stockyard services." The respondent makes it plain in its brief, p. 21, that a market agency may reasonably differentiate between

[5] Tariff 14, item 3 (c). The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D. C.

conditions in the furnishing of stockyard services and may, e. g., refuse to furnish stockyard services with respect to "stolen, mortgaged, or other livestock wrongfully offered" for marketing. In our main brief, pp. 49–51, we refer to the cases and administrative practice which show that reasonable classification or differentiation is allowable in the furnishing of facilities and other services by a stockyard owner or a market agency. As to whether a refusal to furnish facilities or other services is reasonable depends, of course, on an evaluation of the facts in the particular situation.

C. THERE IS NOTHING IN THE "POSTURE OF THE CASE" WHICH REQUIRES OR PERMITS THE COURT TO HOLD THE REGULATIONS INVALID AS A MATTER OF LAW

The respondent's statement, in its brief, pp. 6–8, of the "posture of the case" is not correct. The respondent contends in its brief, p. 8, that the Stock Yard Company assumed the position, in its pleadings, "that the [r]egulation's validity could be determined as a matter of law upon its face." But that argument is antithetical to the Stock Yard Company's position in the entire proceeding. The respondent, as the complainant in the administrative proceeding, filed a complaint which would have afforded the basis for a complete factual inquiry as to the validity of the regulations (R. 39–42), but after the Hearing Examiner indicated that the request of the Stock Yard Company for a subpoena *duces tecum* would be granted (R. 70–71), the respondent, as the complainant in the administrative proceeding, elected to submit the case on the proposition that the regulations are,

as a matter of law, invalid on their face (R. 72). Specifically, the respondent Association stated that it would not present evidence, "as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law" (R. 72). The motion to dismiss filed by the Stock Yard Company was based on its disagreement with the position of the Association. The Stock Yard Company moved to dismiss the complaint because of the complainant's failure to submit evidence (R. 73).

The issue presented to the Judicial Officer was whether the regulations are, as a matter of law, invalid on their face. No one except the Producers Livestock Marketing Association contended or admitted that the validity of the regulations could be determined on their face in the absence of a factual hearing. The Judicial Officer ruled that the validity of the regulations could not be determined in the absence of the relevant facts (R. 15–32), and as we have shown in our main brief, pp. 23–85, the ruling of the Judicial Officer is in accordance with law.

Assuming, *arguendo*, that both parties in the administrative proceeding had agreed that the validity of the regulations is to be determined, as a matter of law, by merely reading the regulations, nonetheless such agreement involves a conclusion of law and, as such, is not binding on the administrative agency or on the courts. *Swift & Co.* v. *Hocking Valley Ry.*, 243 U. S. 281, 289; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 51; *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57, 65 (C. A. 2), certiorari denied, 338 U. S. 825.

D. THE ADMINISTRATIVE WORKABILITY OF THE ACT IS DEPENDENT ON THE CONSIDERATION OF THE RELEVANT FACTS WITH RESPECT TO THE REGULATIONS; AND THE SECRETARY'S INTEREST, IN THIS RESPECT, IS IMMEDIATE AND DIRECT

The statutory terms are applicable to a wide variety of market conditions, as shown in our main brief, pp. 23–73, and the effectiveness of administration is dependent on the consideration and evaluation of the relevant facts with respect to the regulations as to stockyard services in a particular market. Regulatory legislation is, of course, often applicable to "conditions involving details with which it is impracticable for the legislature to deal directly" (*Currin* v. *Wallace*, 306 U. S. 1, 15), and flexibility and dispatch are the salient virtues of the administrative process in applying broad statutory terms to a particular set of facts (*Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 398).

The position of the Secretary is, in this respect, similar to the position of the Federal Trade Commission in *In the Matter of Pillsbury Mills, Inc.*, F. T. C. Doc. No. 6000, decided December 28, 1953, *scil.*:

> The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." It contemplated clarification and completion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears. If a particular

> competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review * * * no longer remain[s]. In such event the administrative agency may as well give way to the prosecutor.

Contrary to the respondent's assertion, in its brief, pp. 59–60, that the Secretary is only a "nominal party," the interest of the Secretary is fundamental in the discharge of his administrative duties in this wide-ranging program. Plainly, the Congress has authorized the Secretary to participate "as of right" in this litigation and be independently represented by counsel. 5 U. S. C. 1952 ed. §§ 1032, 1038, 1040. The respondent's contention that the Secretary is a nominal party merely exemplifies the respondent's failure, in its brief, to address its argument to the case before the Court.

CONCLUSION

For the foregoing reasons, in addition to those in our main brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the judgment of the Judicial Officer, dismissing the complaint, should be affirmed.

ROBERT L. FARRINGTON,
General Counsel,
NEIL BROOKS,
Assistant General Counsel,
DONALD A. CAMPBELL,
Attorney,
U. S. Department of Agriculture, Washington, D. C.

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